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**Proactive release of Report for the National Archival and Library Institutions Ministerial
Group on the status of the Chief Archivist**

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19 July 2018**

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Report for the National Archival and Library Institutions Ministerial Group on the status of the Chief Archivist

1. The Department of Internal Affairs (DIA) has asked me for an independent assessment of the statutory role of the Chief Archivist, which will feed into the work of the National Archival and Library Institutions Ministerial Group (Ministerial Group).
2. The Ministerial Group's terms of reference refer to the development of a work plan which will, relevantly to this assessment:

investigate options to ensure the Chief Archivist has sufficient independence to be an effective regulator of the public sector (this will include a consideration of whether the Chief Archivist should be an Officer of Parliament, as well as comparing how other statutory officer functions retain independence).
3. My own terms of reference are limited to that item. The focus of the assessment is to ensure the office of Chief Archivist has sufficient independence to perform its functions under the Public Records Act 2005 (PRA), including in relation to the public sector, and can fulfil its role in contributing to New Zealand's democratic and cultural infrastructure. In particular, the assessment is to consider whether the role should have the status of an officer of Parliament, having regard to previous practice, as well as considering other options.
4. Among the other options I was asked to consider were:
 - opportunities to improve the Chief Archivist's governance role within DIA;
 - improving the role's authority; and
 - suggesting any other desirable legislative changes, such as enhancing the status of the Chief Archivist and the importance of recordkeeping in an overarching public information statute.
5. After the Executive Summary, I have structured the report as follows:
 - Part 1 sets the context, and defines the problem in terms of the Chief Archivist's independence, status and authority.
 - Part 2 examines options for improving the role's status and authority, including whether this could best be achieved by making the Chief Archivist an Officer of Parliament.
 - Part 3 considers other options for enhancing the role's authority, in governance terms.

- Part 4 briefly considers the potential for wider law reform embracing the whole system of public information management.
- 6. My terms of reference do not extend to considering institutional arrangements. This report is therefore prepared on the basis that Archives New Zealand is an operational unit within DIA and the Chief Archivist is a public servant appointed by the Chief Executive. I am aware that the Ministerial Group will be separately considering the institutional arrangements under its terms of reference.
- 7. I am grateful to DIA for its support role for the assessment, including by facilitating access to a number of key officials and other stakeholders. A list of the people I have spoken to is in the Appendix. I am most grateful for their time, and the depth of their insights, which I will draw upon in Part 1.

Executive Summary

- 8. The Chief Archivist is an independent regulator of public recordkeeping, the *kaitiaki* of the public archives, and a leader in public recordkeeping and management. Some of the Chief Archivist's regulatory powers must be performed independently, under section 12 of the PRA.
- 9. There is no suggestion that the regulatory provisions of the PRA are deficient (except perhaps that the range of powers that must be performed independently could usefully be expanded).
- 10. The problem being addressed instead concerns a lack of adequate status and authority of the office of Chief Archivist in a general sense, whether perceived or real.
- 11. Status and authority are not necessarily derived from independence. But independence can enhance status and authority. Some of the options being considered therefore include the possibility of enhanced independence.
- 12. Making the Chief Archivist an Officer of Parliament has been promoted as one means of addressing the need for enhanced status and authority. While attractive in a general sense, this option is not consistent with principle, and would pose significant practical difficulties. Under criteria developed by the House of Representatives in 1989, an officer of Parliament should be created only rarely, and to perform functions of a parliamentary nature that involve a check on the arbitrary use of executive power.
- 13. It is arguable that the Chief Archivist's role in relation to the creation and disposal of public records acts as a check on the abuse of executive power. But the role is performed as a regulator, with functions and powers (including powers of direction) that are executive in nature. This is not compatible with a parliamentary function or status.
- 14. It would also seem unworkable to make the Chief Archivist an Officer of Parliament while retaining leadership of Archives New Zealand. As a regulatory body, Archives New Zealand rightly sits within the executive branch of government.
- 15. There are other ways of enhancing the status and authority of the Chief Archivist without parliamentary officer status. Two that I recommend for consideration are:

- Recognising the constitutional significance of public recordkeeping, and the Chief Archivist's role in it, through legislative reforms to clarify and strengthen the PRA's purpose and objectives.
 - Enhancing the effectiveness of the Chief Archivist's statutory reporting power, by providing more detail about its purpose and Parliament's expectations about what should be reported.
16. The status of the office of Chief Archivist could also be enhanced by strengthening its statutory independence. I recommend that the following options be considered, with a view to whether they are suitable or necessary for the office of Chief Archivist (whatever the future institutional arrangements):
- Specifying with more detail in the PRA the qualities needed for a Chief Archivist when appointed under the Act.
 - Requiring more people to be involved in the appointment process.
 - Ensuring the appointment process is free of ministerial involvement or influence.
 - Providing security of tenure, similar to that enjoyed by officers of Parliament and members of independent Crown entities.
17. The report also considers options for improving the Chief Archivist's governance role within DIA. While any chief executive should be able to determine the best organisational structure for his or her office, a statutory officer embedded within a department should always be able to raise issues about his or her statutory role directly with the chief executive, for example to "get the ear" of the chief executive on matters of funding.
18. Establishing a formal reporting line to the Chief Executive, in addition to the existing line management arrangements for the Chief Archivist's position, could be a useful and visible enhancement of the existing informal channels. I recommend this be considered.
19. Finally, the report briefly considers the future option of recognising the importance of recordkeeping, and the role of the Chief Archivist, in a more fundamental reform of New Zealand's information statutes. The existing framework has developed over many years, as a product of evolution rather than design, and without any unifying set of principles. It also lacks consistency with emerging principles about open access to information and data stewardship. An modernising enactment could include an overarching, integrated statement about the objectives of public information management, including the importance of recordkeeping and the role of the Chief Archivist.

Context and problem definition

20. I consider it helpful to set out the context in some detail, based on an analysis of the current statutory position and drawing on the observations made by those I was able to speak to. This also enables an understanding of what problem needs to be addressed.

Context

21. The Chief Archivist is a statutory officer, who is appointed by the Chief Executive of DIA under the State Sector Act 1988. The Chief Archivist is therefore a public servant, who works within DIA. There is nothing unusual about this: many other statutory officers are appointed and work in this way. (I will refer to them as “embedded statutory officers”.)
22. The Chief Archivist has specific functions and powers under the PRA. They include regulatory functions, the administration and preservation of national archives, and leadership roles. Section 12 of the PRA specifies certain specific regulatory functions that must be exercised independently:

Chief Archivist to act independently

In relation to the performance of his or her functions and duties and to the exercise of his or her powers under sections 11(1)(b) and (d), 20(1), and 30, the Chief Archivist—

- (a) must act independently in exercising his or her professional judgement; and
- (b) is not subject to direction from either the Minister or the chief executive.

23. Statutory independence provisions are not unusual in the Crown entities sector. Section 113 of the Crown Entities Act 2004 makes express provision for “statutorily independent” functions of some Crown entities. An example is section 13(1A) of the Privacy Act 1993, in relation to the statutory functions, duties and powers of the Privacy Commissioner. The Crown Entities Act also categorises some statutory Crown entities (including the Privacy Commissioner) as “independent Crown entities” in themselves. This gives their office holders security of tenure and protection against arbitrary removal from office; independently determined remuneration; and freedom from Ministerial direction.
24. In contrast, it is unusual for an embedded statutory officer to have an express statement of statutory independence in relation to their role. The Chief Archivist is in something of a special position in this respect. Two other examples of embedded statutory officers¹ who have statutory independence are:
 - the Director of Public Health, who exercises the functions of advising and reporting to the Minister of Health on public health issues independently of the Director-General (Health Act 1956, s 3D); and
 - the Legal Services Commissioner, who makes decisions on the provision of legal aid independently (Legal Aid Act 2011, section 71(2)).
25. Most other embedded statutory officers perform their roles without any express statutory independence. Examples include the Registrar of Companies, the Registrar-General of Land, and the Surveyor-General.
26. The Chief Archivist has a number of powers and duties which lend strength to the functions and powers of the office, including those that must be exercised independently under section 12 of the PRA. They include:

¹ The Government Statistician also has statutory independence in relation to the production and publication of statistics (Statistics Act 1975, section 15), but is a chief executive.

- (a) Powers of access to information for the purpose of the office's regulatory functions; powers to direct the chief executives of public offices; and powers of inspection and audit of the recordkeeping practices of public offices.
 - (b) A duty to report annually to the Minister on the state of recordkeeping within public offices. The Minister must present each report to the House of Representatives. This provides the Chief Archivist with important recourse to Parliament, independently of the Chief Executive and the Minister.
27. Other safeguards exist against interference in the Chief Archivist's work, and to promote the Chief Archivist's accountability for the performance of the office's independent functions. They include:
- (a) The existence of the Archives Council, which is a source of independent advice to the Minister on recordkeeping matters but, in practice, also provides guidance and support to the Chief Archivist.
 - (b) Rights of appeal against certain decisions of the Chief Archivist. Appeals are considered independently of the Minister, by the Archives Council, with a power of recommendation to the Minister.
 - (c) Periodic audits of the recordkeeping practices of the Chief Archivist. These are commissioned by the Minister, but must be independent. Moreover, the Minister must present the report on each audit to the House.
28. All of these provisions were in the PRA at the time it was enacted in 2005. I heard nothing to suggest they are deficient (except perhaps that the range of powers specified in section 12 could usefully be expanded).

Problem definition

29. What, then, is the problem that needs to be addressed? The problem is clearly not with the independence of the Chief Archivist as a regulator. Nor is it with the lack of any broader leadership role, which is expressly conferred by section 11 of the PRA.
30. Rather, the problem appears to be a perceived lack of status or authority of the office of Chief Archivist, as a lower-level manager within DIA and, in the broader sense, as a key public official in the overall public sector information "ecosystem".
31. To a large extent, the perception appears to be a legacy of the extreme frustration of those connected with the office, and in the recordkeeping profession, about the merger of Archives New Zealand and the Chief Archivist into DIA.
32. Crown Law advice given to the select committee that considered the bill leading to the merger in 2010² concluded that a requirement for the Chief Archivist to exercise functions independently under the PRA would not be incompatible with the Chief Archivist no longer being the head of their own department. That seems right in principle, but there is a practical dimension. Former Chief Archivists I spoke to stressed the importance of the role of Chief Archivist having equal or equivalent status to that

² Sourced from the booklet of submissions on the Bill, supplied to me by DIA.

of departmental chief executives. I understand that need to have been accepted by Ministers at the time the separate department was created – the notion being that, in practice, only a chief executive has the status to direct another chief executive and take necessary action with other senior officials of government if there is a failure to comply. The strength of the Chief Archivist's statutory reporting power, as a means of holding errant public offices to account, is also seen to depend on the broader status of the office.

33. There is also the question of potential interference in the exercise of statutory power by an official who is both embedded in a department and subject to direction (in a managerial or employment sense) by the chief executive or other more senior managers. One experienced former statutory officer told me that she had never experienced any such interference. She was aware of situations where, for example, an embedded statutory officer had to exercise a power against the officer's own department and chief executive, without difficulty. A similar situation occurred, again without interference, in the then Chief Archivist's 2015 inquiry into the status of ministerial text messages (one of the subject agencies of the inquiry being another division of DIA). There was no other suggestion of any interference in the current environment of DIA.
34. However, while that might be commonly the practice in the benign environment which typically prevails in the New Zealand public service, the law should always consider the need to safeguard the exercise of independent powers against the risk of interference, whether from within the officer's department or by Ministers or others in authority.
35. While these issues go to some extent to the institutional arrangements which lie outside my terms of reference, they do impact on the question of the "status" of the Chief Archivist. To that extent, they are relevant to the problem definition.
36. The perception of a loss of status seems also more deep-seated. The creation and preservation of public records was described to me as "foundational" to the system of public information management. Many also stressed the high national (if not constitutional) importance of public archives as "the memory of government". There is a sense that, despite having a modern public records statute, the Chief Archivist still lacks a sense of status as the *kaitiaki* of the national archives; a sense of authority in the underpinning regulatory system; and, perhaps, recognition as a leader in the recordkeeping profession (much as the Auditor-General is seen as a leader in the accounting and auditing profession, underpinned by international standards).
37. The current Chief Archivist also described the PRA and the official information statutes as "two sides of the public record-keeping coin". It is an apt description, which raises a point of comparison between the status of the Chief Archivist (as the regulator of the public records system) and those of the Ombudsmen (as the reviewers of official information access decisions) and arguably also the Privacy Commissioner. The Ombudsmen are officers of Parliament, with all the status and independence that that label attracts. And the Privacy Commissioner is an independent Crown entity. Both offices have security of tenure, protections against arbitrary dismissal from office, and independently determined remuneration – none of which the Chief Archivist has.

38. Looking to the future, there is a sense that the Chief Archivist's leadership role needs some enhancement, especially as we enter the digital era. This was seen as significant by everyone I spoke to across the "ecosystem". Both the Chair of the Archives Council and one former Chief Archivist saw this leadership role as critical, and a core quality for any Chief Archivist in the modern era.
39. This view was not shared by everyone I spoke to. Some in the profession see the Chief Archivist's involvement in sector-wide activity (for example, the development of policy on data sharing and stewardship) as detracting from the office's core responsibilities under the PRA. This supports the notion that the Chief Archivist should always be a member of the recordkeeping profession, with corresponding status as a leader of the profession.
40. Others stressed the importance of the Chief Archivist having managerial ability (Archives New Zealand being a significant business, facing significant business challenges) and being able to work effectively across the information management system. But, while the Chief Archivist's leadership role is important in public policy (as manifested in the recent, and widely-praised, 30-year strategy published by the office), some pointed out that the role has to be performed together with others in the public policy space (including, for example, the Government Statistician as the Government Chief Data Steward).
41. Familiarity with *te o Maori* was suggested as another key quality affecting the status and authority of the Chief Archivist.
42. There is one other important factor. Everyone I spoke to who has connections with the office, or the recordkeeping profession, mentioned the issue of resources. It is a recognised principle that, to function effectively, an independent statutory officer needs access to adequate resources and capital to discharge his or her mandate effectively. There is a widely-held view that Archives New Zealand has been under-funded for many years, in terms of both human resources to support its regulatory role and the necessary capital expenditure to house the repository and manage the transition to digitised recordkeeping. One key stakeholder described the issue in terms that "tinkering with the PRA will not get to the heart of the issue of the Chief Archivist's ability to perform independently, if the future resourcing of the office and its infrastructure is not taken seriously and addressed".
43. Among those who raised the issue with me, there was no consensus about the comparative advantages or disadvantages of having to work within a large department, and through a large departmental Vote, as opposed to having a separate Vote with direct access to Ministers about resourcing matters. (A separate Vote could exist either inside or outside the DIA structure.)
44. This question is outside my terms of reference, except that a more effective means of obtaining funding could enhance the independence and status of the office of Chief Archivist in the practical sense referred to. The point also impacts on the officer of Parliament question, given the separate funding mechanism available for offices of Parliament under the Public Finance Act 1989 (in practice, using the Officers of Parliament Committee and an address by the House to the Crown). But more than one person pointed out that, as history demonstrates, that mechanism is by no means a guarantee of a higher level of resources.

45. I will not comment further on the resourcing issue, which is a matter for other policy advice.

Options for strengthening the independence, status and authority of the Chief Archivist

46. Having defined the issue in terms of the overall status and authority of the office, rather than any lack of independence in the performance of its regulatory role, I will now consider what options might be available to strengthen those aspects of the office.

47. Status and authority are not necessarily derived from independence. But independence, especially in a general sense, can enhance status or authority. Some of the options therefore address the possibility of enhanced independence, especially in terms of the Chief Archivist's employment status.

48. The question of whether the Chief Archivist should be an Officer of Parliament is the starting point, given the Ministerial Group's terms of reference. For reasons that follow, I do not consider that status to be either a principled or workable solution to the problem as identified. Options for strengthening the Chief Archivist's status and authority can, however, be considered in other ways – even if the role is to remain below chief executive level. Options discussed later in this part of the report are:

- (a) enhancing the Chief Archivist's constitutional status and authority, by mechanisms such as an overarching statement in the PRA about the importance of public recordkeeping and its contribution to wider national outcomes, and enhancing the reporting power of the office; and
- (b) strengthening the processes for the appointment, tenure, and possibly the remuneration of the Chief Archivist.

Should the Chief Archivist be an Officer of Parliament?

49. As I understand it, the proposal that the Chief Archivist should be an Officer of Parliament arises from a sense that the existing Officers of Parliament have a higher constitutional status (in our unwritten constitutional system), which enhances their moral authority as well as establishing a direct relationship with Parliament.³

50. The status of officer of Parliament in New Zealand originates from the establishment of the office of Ombudsman in 1962. New Zealand was the first country in the Commonwealth to establish an Ombudsman.

51. The original Ombudsman Act designated the first Ombudsman as "an Officer of Parliament", but without explanation of what the role was meant to signify. It was nevertheless understood that the office would perform functions of a parliamentary nature. The Ombudsman's role of investigating citizens' complaints about unreasonable or improper administrative action, and reporting on them to

³ The analysis that follows draws heavily on a chapter about officers of Parliament in New Zealand and Australia, written by the current reviewer for a publication by the UK Study of Parliament Group (based at the University College London) entitled *Parliament's Watchdogs: At the Crossroads* (ed. Gay and Winetrobe, 2007).

Parliament, was seen as an enhancement of both the representative function of members of Parliament and the citizen's right to petition Parliament.

52. In 1982, the Official Information Act reformed the system of government-held information, and established the now-familiar rights of access to information under the principle that official information should be made available unless good reason exists to withhold it. The Committee that devised the Act (known as the Danks Committee, after its Chairman) proposed in its General Report⁴:

that the Ombudsmen should deal with individual complaints about the disclosure and non-disclosure of information, including those arising in respect of a wider range of Government agencies ... In part this proposal involves no change. The Ombudsmen already can and do handle cases in the information field, in accordance with their well established procedures and with the mana that the office has acquired over two decades.

53. Another Officer of Parliament, the Parliamentary Commissioner for the Environment, was established in 1985. The functions of the Commissioner are (as set out in section 16 of the Environment Act 1985) to review public systems and processes in relation to environmental matters and report to the House; and to investigate or inquire into and report on matters of environmental planning and management. There was criticism, at the time, that the Commissioner's mandate did not meet the description of functions of a parliamentary nature.
54. In 1989, the Finance and Expenditure Committee undertook an inquiry into the constitutional status of officers of Parliament. The inquiry was prompted by questions about whether the Controller and Auditor-General should have formal recognition as an Officer of Parliament. Significantly, the Committee's report⁵ sketched a framework for the status of an officer of Parliament, which remains the only authoritative description of what the status should involve.
55. The report established three principles, which are likely to form the basis of considering any proposal relating to the Chief Archivist:
- An Officer of Parliament should only be created to provide a check on the arbitrary use of power by the executive.
 - An officer of Parliament should only discharge functions which the House itself, if it so wished, might carry out.
 - Parliament should consider creating an officer of Parliament only rarely and in separate legislation principally devoted to the office, and should from time to time review the appropriateness of each officer's status as an officer of parliament.
56. At that time, the status of officer of Parliament referred only to the individual office-holder. The shared characteristics of each officer were that they were appointed by the Governor-General on the recommendation of the House, i.e., without involvement of Cabinet, and had protections from arbitrary removal from office.
57. Subsequent reforms addressed the institutional status of their offices, including their funding arrangements. Under the Public Finance Act, each "office of Parliament" now has a separate status

⁴ Available on the website of the Ombudsmen.

⁵ *Report of the Finance and Expenditure Committee on the Inquiry into Officers of Parliament, 1987-90, AJHR, I.4B.*

from departments and other instruments of the Crown (in the sense of the executive branch of government). For purposes of planning, funding, and accountability, their "responsible Minister" is in each case the Speaker. Their funding is determined by resolution of the House, on the recommendation of the Officers of Parliament Committee (which is also responsible for recommending to the House the appointment of an Officer). Institutionally, then, each Officer and office of Parliament sits outside the executive.

58. The Controller and Auditor-General (and the Deputy) attained formal recognition as Officers of Parliament in the Public Audit Act 2001. Both the "Controller" and the "Auditor-General" elements of the offices serve the constitutional principles that only Parliament can raise taxes or authorise the expenditure of public funds, and that the executive is accountable to Parliament for its use of the appropriated resources. This makes them inherently parliamentary in nature.
59. This brief history is important to a consideration of whether the Chief Archivist should also be an Officer of Parliament. It is certainly arguable that the creation of public records, and controls over the disposal of records, act as a check on the abuse of power by the executive and promote the executive's accountability to Parliament. The office of Chief Archivist has a key role in that system. It has also been suggested that the office's functions of inspecting and conducting audits of public records management are equivalent to the Controller and Auditor-General's role as the public sector auditor. More broadly, it is suggested that the Chief Archivist's role of "safeguarding" or *kaitiakitanga* in relation to public records is a matter of core parliamentary interest.
60. These arguments deserve recognition. However, with reference to the 1989 criteria it is questionable whether the described functions and responsibilities are parliamentary, i.e., of a type that the House itself could, if it wished, carry out or perform.
61. The distinguishing factor is that the Chief Archivist is primarily a regulator of public offices, with regulatory powers which have mandatory effect. They include setting standards; directing chief executives to apply them; and determining whether a public record should be disposed of. These are all functions of an executive nature. None of the existing officers of Parliament have responsibilities of this kind – their roles being recommendatory rather than directive.⁶ The Chief Archivist's inspection and auditing functions are regulatory tools, not something fundamental to the office's role (as is the case with the Controller and Auditor-General).
62. Regulatory functions certainly enhance accountability and control the arbitrary use of power. However, that does not make them parliamentary in nature.
63. Parliament has established other regulators to enhance accountability for executive action. The Privacy Commissioner is one such body. The Commissioner regulates the collection, use, and disclosure of personal information through, for example, the development of privacy codes. The Commissioner also has a complaints investigation function, including in relation to public sector

⁶ Once exception for the Auditor-General is the power to prosecute members of local authorities under the Local Authorities (Members' Interests) Act 1968, which is recognised as out of date and incompatible with officer of Parliament status.

agencies, and can carry out audits of personal information.⁷ The Health and Disability Commissioner has a similar role in the health sector.

64. One distinguishing feature of these offices, which perhaps disqualifies them from being officers of Parliament themselves, is that their regulatory roles extend beyond the public sector, and hence the reach of parliamentary accountability. However, another complaints body, the Independent Police Conduct Authority, has an exclusively public sector jurisdiction and yet does not have office of Parliament status.
65. An ability to report to Parliament is fundamental to an officer of Parliament's role. But it is not, of course, unique to them: all agencies of the executive, including regulators, must report to the House annually (albeit through their Ministers). In the case of the Chief Archivist, there is the existing requirement that the Minister must present the Chief Archivist's annual reports under section 32 of the PRA to the House.
66. A number of other attempts have been made over the years to gain officer of Parliament status for "watchdog" institutions, including the Human Rights Commission and the Children's Commissioner. Both of those proposals were driven by a perception that, as independent officers with functions that required them to advocate for the interests of citizens against those of the state, neither should be dependent on the Crown for appointment or funding; and that giving them the status of parliamentary officers would achieve a greater degree of separation from the Crown and more safety in terms of their independence. Both moves failed, despite a recognition that equivalent bodies in other jurisdictions had parliamentary status to some extent.
67. A similar case might be advanced for the Chief Archivist, for example in the "safeguarding" or *kaitiakitanga* role in relation to public records. But it seems difficult to describe the office as a "watchdog", except in a limited sense. And its regulatory functions should make it subject to, rather than removed from, the type of oversight that is connoted by the parliamentary "watchdog" label.
68. Both the Human Rights Commission and the Children's Commissioner now have the status of independent Crown entities under the Crown Entities Act. This achieved many of the objectives sought by the officer of Parliament proposal, including (as noted earlier) security of tenure and freedom from Crown direction.
69. There is a further difficulty which affects the workability of the officer of Parliament concept for an office such as the Chief Archivist. As a regulatory body and the repository of the public archives, Archives New Zealand rightly sits in the executive branch. Making the Chief Archivist an Officer of Parliament, while also retaining the role of heading Archives New Zealand, would require moving Archives out of the executive altogether and giving it the status of an office of Parliament under the Public Finance Act. This would mean that the Speaker would become the office's "Minister" and without access to actual Ministers. The alternative would be to remove the Chief Archivist's regulatory and managerial roles and have them performed by someone else. That may go beyond what is envisaged by the officer of Parliament proposal.

⁷ Privacy Act 1993, section 13.

70. One final point relates to the Ombudsman comparison, i.e., the sense that the Chief Archivist should have the same status as the Ombudsmen because of the complimentary roles they have in the public information system.
71. The comparison is not fully supported by practice in equivalent jurisdictions to New Zealand.
72. The Ombudsmen's status as Officers of Parliament derives from what is known as the "classical ombudsman" role, as mandated by the Ombudsmen Act 1975. The Danks Committee's rationale (quoted above) for conferring the official information review functions on the Ombudsmen, as an extension of that classical role, was undoubtedly right in principle, but it also had an element of pragmatism.
73. Of comparable jurisdictions, only Canada has used the officer of Parliament model for the review or appeal mechanisms under its freedom of information legislation. Under the Access to Information Act 1985 (Can), the Information Commissioner is appointed by the Governor-General after consultation with parliamentary parties and resolution of the House of Commons. But other jurisdictions have not taken this approach:
- In the United Kingdom, the New Zealand approach was expressly rejected in its freedom of information reform in 2000, in favour of a statutory information commissioner which expanded the role of the existing data and privacy commissioner. The Commissioner is a statutory officer, appointed by the Crown (under the Freedom of Information Act 2000 (UK)).
 - Similarly, the Office of the Information Commissioner in Australia is a statutory office, and the Commissioner is likewise appointed by the Crown (under the Australian Information Commissioner Act 2010 (Cth)).
74. This suggests that parliamentary status is not a pre-requisite for the review or appeal body under freedom of information legislation. Making the Chief Archivist an Officer of Parliament, just to achieve equivalent status to the Ombudsmen for the purposes of the public information management framework, is not a reason in itself to support giving it the status.

Other ways of enhancing the Chief Archivist's status and authority

75. Other options exist for achieving some of the advantages perceived from the officer of Parliament proposal. Two in particular can be discussed.
76. The first is to enhance the objectives of the PRA, and the office of Chief Archivist, with statements emphasising their importance to the system of government.
77. One of the reasons for promoting the officer of Parliament concept is, I understand, the need to strengthen the role and standing of the office of Chief Archivist in a constitutional sense. This could be expected to give more prominence to the importance of public recordkeeping and the national significance of the public archives as the "memory of government"; and emphasise the need for leadership to promote good public recordkeeping and increase understanding of the national archives' importance to public life. These values could rightly be described as constitutional.

78. New Zealand does not have a written constitution. Among the significant pieces of legislation which make up our constitution are the Official Information Act 1982, the Bill of Rights Act 1990, the Ombudsmen Act 1975, and the Public Audit Act 2001. In other countries that do have written constitutions, it is not uncommon (and indeed is promoted by various international declarations and conventions) that offices like the Ombudsman and the Auditor-General are established by the Constitution, giving them the status of constitutional officers.
79. Although express constitutional recognition is not possible in New Zealand, Parliament is able to recognise constitutionally important values. Using modern legislative drafting approaches, high-level statements can be included in an Act about its purpose; the outcomes or objectives that are being served; the significance in national terms of the activity that is being legislated for; and the role performed by a statutory officer.
80. A case could undoubtedly be advanced for enhancing the PRA's statements about the significance of the recordkeeping system, and the role of the Chief Archivist, in those terms.
81. The second possible option is to strengthen the Chief Archivist's power to report.
82. It will have been clear from the earlier discussion of officers of Parliament that their powers to report directly to Parliament are critical to their effectiveness in promoting executive accountability to Parliament. I heard some observations that the Chief Archivist's reporting power under the PRA has not been exercised to the extent that was expected in 2005, for example to hold accountable public offices that do not comply with the recordkeeping standards. This is ultimately a matter for each Chief Archivist's professional judgment. But the insertion of some additional descriptions in section 32(1) of the PRA, about the matters that should or could be reported might signal Parliament's expectations more clearly.
83. Empowering the Chief Archivist to report directly to Parliament, instead of (or as well as) through the Minister, might also be seen to enhance the office's independence and overall status.

The appointment and tenure of the office-holder

84. Several options exist to strengthen the position of Chief Archivist, whether or not the role remains an embedded statutory officer appointed by the Chief Executive.
85. Each of the following options found support from those I spoke to:

Specifying in more detail the qualities needed for a Chief Archivist when appointed under the Act:

Currently there is no statutory description of the qualities required of a Chief Archivist. The most significant of those mentioned were an understanding of the system of government; a knowledge of and familiarity with recordkeeping; an understanding of the roles of a statutory regulator and a *kaitiaki*; familiarity with *te ao Māori*; and experience in leading and managing a business. Enshrining those qualities in legislation (but without a level of detail that might become outdated, or that is more appropriate for a position description) is worth considering.

Involving more people in the appointment process: Currently the Chief Archivist is appointed by the Chief Executive of DIA, relying on the general power to appoint public servants under the State Sector Act. By comparison, the process for appointing chief executives by the State Services Commissioner (under section 35 of the Act) requires the Commissioner to establish a committee which acts as an appointment panel. That model works effectively. Its benefits include bringing outside expertise to the process; enhancing the prospects of a suitable appointment; and increasing public confidence in the appointment process.

There is, of course, nothing to prevent the Chief Executive of DIA from establishing a panel to support the appointment process for a Chief Archivist. This has been the practice historically. But there would seem to be merit in considering a statutory requirement for a panel, to shore up the State Sector Act process, make the process more visible, and enhance stakeholders' confidence in it. One suggestion was that the chairperson of the Archives Council should be an *ex officio* member of the panel.

Ensuring the appointment process is free of ministerial involvement or influence: The appointment of public servants other than chief executives is a responsibility of the department's chief executive. By its nature, this excludes the possibility of direct ministerial involvement or influence. But that is not the case for chief executives of departments. Section 35 of the State Sector Act requires that, following the deliberations of the panel referred to earlier, the Commissioner must make a recommendation to the Minister and the appointment is finally approved (or declined) by the Governor-General in Council.

In the case of the Government Statistician, section 37 of the Act expressly excludes the requirement for Ministerial involvement. Similarly, there can be no involvement by Ministers in the reappointment of the Statistician (section 37(3)). I was told that this safeguard is intended to support the independence of the Statistician under section 15 of the Statistics Act 1975, and (more recently) by the Government's acceptance of the *Fundamental Principles of Official Statistics* (which were adopted by the UN General Assembly in 2014).⁸

Many of those I spoke to were quick to point to the Government Statistician as a valid point of comparison for the role of Chief Archivist, and an alternative to the officer of Parliament approach. The comparison is not currently valid, given that the Chief Archivist is not a chief executive and the method of appointment (by the Chief Executive of DIA) already excludes the possibility of Ministerial involvement or influence. But, were the role to be re-elevated to chief executive level, it would certainly be helpful to consider whether the principles that drive ministerial exclusion from the appointment of the government's statistician should also apply to its chief record-keeper.

Security of tenure: In principle, any statutory officer who has independent powers needs to be protected from retaliation against the use of those powers in a particular way. To achieve this, it is not uncommon for these protections to be written into the legislation establishing the position. If the

⁸ A/Res/68/261, 29 January 2014.

office-holder is also an employee, the protections are in addition to those available under the individual's employment agreement and under employment law.⁹

The need for these types of protection can be easily understated. But they can assume relevance quickly and unexpectedly, especially if the use of independent powers becomes politicised. The risks of that happening in the modern era should not be overlooked.

If greater security of tenure were thought necessary, any of the following could be considered:

- A fixed term of office, for example of not more than 5 years.
- Protection from arbitrary removal from office (using protections similar to those for independent Crown entity members and/or the officers of Parliament), and/or a process that the Chief Executive must follow before removing a Chief Archivist from office (for example, a requirement to consult the chairperson of the Archives Council first).
- Remuneration determined independently (by the Remuneration Authority), with non-reduction of an individual's remuneration while in office.
- An immunity against civil or criminal liability for independent acts performed in good faith.

Possible opportunities to improve the Chief Archivist's governance role within DIA

86. My terms of reference invite me to consider what opportunities exist to improve the Chief Archivist's role within DIA.
87. Currently, the Chief Archivist sits at the third tier of management within the Department. In "line management" terms, that means the Chief Archivist has no direct accountability, and potentially limited access, to the Chief Executive. Under DIA's management structure, the Chief Archivist is not a member of the leadership team, although the position is part of DIA's senior leader cohort.
88. I was told by the existing and immediate past Chief Archivists that, in current circumstances, this issue is more one of perception than reality. Neither has had difficulty accessing the Chief Executive. The Chief Archivist also has direct and frequent access to the Minister when necessary, either separately (for the purpose of his statutory powers) or with the Chief Executive (for other purposes).
89. Despite this, as mentioned earlier the lower managerial status of the Chief Archivist seems to be a significant aspect of the concerns which the merger generated for the recordkeeping profession and other external stakeholders.
90. Any chief executive should be able to determine the best organisational structure for his or her department. The usual practice is for a department's leadership team, which is responsible for supporting the chief executive in both governance and management terms, to include only those who report directly to the chief executive (i.e., second-tier managers). For an organisation as large as DIA,

⁹ For example, the provision allowing removal of a chief executive from office under the State Sector Act does not apply to the Solicitor-General, because of the constitutional functions of the office.

this is also a matter of practical reality – which largely explains why the Chief Archivist and the Chief Librarian found themselves at third tier, and excluded from executive leadership roles, when the merger took place.

91. Despite these realities, there is clearly a case for saying that an embedded statutory officer should always be able to raise issues about his or her statutory role directly with the chief executive, wherever they sit in the management framework. Other roles carry the same imperative, such as the general counsel, the chief financial officer, or an internal auditor.
92. One way of achieving this in management terms is to use the principles of matrix management, which eschew the use of vertical hierarchies and operate on more functional lines. A driving principle is that information needs to flow to those who most need it, when they need it. Typically, this is done by the use of what are called “dotted line” reporting requirements which by-pass the line management system.
93. Thus, for example, a general counsel owes professional duties to the Crown and the department, as his or her clients, and not just to the line manager to whom they are accountable as an employee. It is well recognised that a general counsel needs a “dotted line” reporting channel to the chief executive, and to the board of the entity where one exists, so that matters of significant legal risk to the entity can be raised effectively and confidentially.
94. Similar principles can be seen to apply to employees who exercise statutory functions within a public sector entity. That may prompt the development of informal practices, enabling the officer to “get the ear” of the chief executive (or indeed the Minister) when needed. One situation where this might be important is if the officer has insufficient access to resources to perform his or her statutory functions effectively, if at all. These can raise matters of legal and reputational risk, which the chief executive needs to know about and should be the subject of direct discussion.
95. Establishing a formal “dotted line” relationship between the Chief Archivist and the Chief Executive could be a useful and visible enhancement of the existing informal channels.

A more fundamental legislative reform?

96. The final option I was asked to consider is whether the role of the Chief Archivist might be enhanced through a more fundamental reform of the legislation governing the management of public information in New Zealand. This is a more far-reaching idea, which would need in-depth consideration.
97. The underlying proposition is that the statutory framework for New Zealand’s information management has evolved over many years in an *ad hoc* fashion, without any unifying set of principles. The framework consists of a number of “generic” statutes, as well as a wide array of sector-specific legislation that deals with information management matters. The generic statutes include (in order of their enactment):

- the Ombudsmen Act (recognised as a means by which citizens can receive information about government administration affecting them);
 - the Statistics Act;
 - the Official Information Act and the Local Government Official Information and Meetings Act 1987 (LGOIMA);
 - the Privacy Act;
 - the Copyright Act 1994; and
 - the PRA (which was preceded by the Archives Act 1957).
98. The manner in which the generic statutes interact with each other is not always clear, either at a level of principle or in terms of procedure and implementation. Why this is so can be explained by their cumulative legislative history, which is the product more of evolution than systematic design.
99. For example, the recordkeeping requirements of the PRA are format neutral, i.e., they apply irrespective of the format in which records are created or held. But this is narrower in scope than the other generic statutes. The PRA applies only to "records", whereas the Official Information Act, the LGOIMA, and the Privacy Act apply to "information", whether held in documentary or non-documentary form.
100. The overall relationship between the generic and the sector-specific statutes is well understood (i.e., the generic are subject to the specific). But that relationship is not supported by any overt legislative policy, and restrictive provisions in sector-specific statutes can have the effect of undermining the application of the generic legislation. Moreover, there has been little in the way of principled review of existing sector-specific legislation since the mid 1980s. And the current statutory framework is not necessarily consistent with emerging principles about open access to information, proactive public disclosure, and non-statutory instruments (such as the *New Zealand Data and Information Management Principles*, mandated by Cabinet in 2011, and more recent initiatives on data stewardship).
101. Were an opportunity to arise to review and reform this legislative framework, one option would be to develop an overarching, integrated statement about:
- the objectives of public information management (such as how public records are created and disposed of, and how access to official information and data sharing within government are to be balanced against the preservation of personal privacy); and
 - the responsibilities of the statutory officers within the system (which would, obviously, include the Chief Archivist).
102. That longer-term scenario might provide an opportunity to enhance the status and authority of the Chief Archivist in the ways described earlier in this report.¹⁰

¹⁰ For further information on this subject, refer to advice provided by this reviewer to DIA in 2015.

Appendix: People spoken to during the assessment

Ms Sandi Beattie, Chairperson of the Archives Council

Mr John Edwards, Privacy Commissioner

Mr Richard Foy, Chief Archivist

Ms Marilyn Little, former Chief Archivist and now Deputy Chief Executive, Policy, Regulation and Communities, DIA

Ms Dianne Macaskill, former Chief Archivist

Ms Mandy McDonald and Ms Janet Upton, LINZ

Mr Sean McMahon, President of the Archives and Records Association of New Zealand (ARANZ)

Ms Rachel Milicich and Mr Adam Brown, Statistics New Zealand

Ms Kathryn Patterson, former Chief Archivist.

The Chief Ombudsman, Judge Peter Boshier, was unfortunately not available at a convenient time to meet the reviewer.